THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P. No. 3481 of 2006
and
C.C. No. 615 of 2006

DATED: 26-04-2007

Between:-

K. Ram Das s/o Chinnappa, aged 56 years, working as Secretary, HALVI LSCS Ltd. Of Kowthala Mandal, Kurnool District.

..PETITIONER

And

The Divisional Co-operative Officer, Adoni, Kurnool District and two others.

..RESPONDENTS

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W.P. No. 3481 of 2006
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COMMON ORDER

Seeking a direction to the respondents to release subsistence allowance from the date of suspension, and to continue payment of subsistence allowance till finalisation of the disciplinary proceedings, the present writ petition is filed by the erstwhile Secretary of the Primary Agricultural Co-operative Society.

This Court, by order dated 04-04-2006, directed the respondents to pay subsistence allowance to the petitioner in accordance with Section 47(6) of the A.P. Shops and Establishments Act (for short 'the Act') with effect from the date of his suspension dated 03-12-2003 pending further orders. Alleging non-compliance, of the aforesaid order of this Court, the petitioner filed C.C. No. 615 of 2006.

Sri P. Raghavender Reddy, learned counsel for the petitioner, would contend that, as against the petitioner's entitlement towards subsistence allowance, the respondents had paid only a sum of Rs. 50,000/-. On a vacate stay petition being filed by the respondents in the writ petition, both the writ petition and contempt

case were taken up for hearing together and are now being disposed of by a common order.

In the additional counter-affidavit, filed by the 3rd respondent, it is stated that the petitioner is a paid Secretary and was allotted to Halvi Large Sized Co-operative Society, that he was drawing Rs. 12,148/- as salary and that subsequently, vide G.O.Ms. No. 226 dated 31.5.2005, the salary of the Secretary was fixed at Rs. 7,000/-. According to the respondents, the nature of duties attached to the post of Secretary empowers him to disburse loans, collect loan amount from the members of the society, issue notice for recovery of the loan amount etc. and that the Secretary has the power to take disciplinary action against employees working under his control and, in view of the nature of the duties attached to the post of Secretary, he would not be treated as an employee and would be exempted from the applicability of the provisions of the A.P. Shops & Establishment Act, under Section 73(1)(a) thereof. Respondents would contend that, since a paid secretary of the society falls within the exemption under Section 73(1)(a) of the Act, the petitioner was not entitled to invoke the provisions of the A.P. Shops & Establishments Act. They would also refer to the fact that a charge memo had been issued to the petitioner herein wherein grave and serious charges of corruption and misappropriation of funds are alleged. According to the respondents, since the provisions of the A.P. Shops and Establishments Act do not apply, no reliance can be

placed on Section 47(6) of the Act to claim payment of subsistence allowance. Respondents would further contend that, in the absence of any statutory obligation, a writ petition would not lie against the respondent co-operative society, a society registered under the A.P. Co-operative Societies Act, even if it be for enforcement of its bye-laws.

Sri P. Raghavender Reddy, learned counsel for the petitioner, would contend that, without payment of subsistence allowance any enquiry held into the allegations levelled against an employee is vitiated. Learned counsel would contend that the petitioner is an employee, under the A.P. Shops and Establishments Act, and, since the said Act applies to Co-operative Societies, the petitioner is entitled to the benefits under the Act and for payment of subsistence allowance in accordance with Section 47(6) thereof. Learned counsel would contend that, even if the respondents were to dispute the applicability of the provisions of the Act, since no complicated questions of facts are involved, it is always open for this Court to examine these factual aspects in writ proceedings under Article 226 of the Constitution of India, to decide whether the provisions of the A.P. Shops and Establishments Act apply or not. Learned counsel would contend that, even if the provisions of the A.P. Shops and Establishments Act were held not to apply, payment of subsistence allowance under the bye-laws of the Co-operative Society constituted a part of the contract

of employment for enforcement of which the petitioner was entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. Learned counsel placed reliance on **A.B.L. INTERNATIONAL LTD. AND ANOTHER V. EXPORT CREDIT GUARANTEE CORPORATION OF INDIA LTD. AND OTHERS**[1]**.** Learned counsel would contend that since the writ petition has already been admitted, this Court would be reluctant to now relegate the petitioner to the alternative remedy available to him either under the provisions of the A.P. Shops and Establishments Act, 1988 or before a civil court of competent jurisdiction.

Sri O. Manohar Reddy, learned counsel for the respondents, on the other hand, would contend that the writ petition as filed is not maintainable. Learned counsel would submit that since the petitioner, in view of Section 73(1) of the Act, is not covered by the provisions of the A.P. Shops & Establishments Act, the question of accepting the petitioner's claim for payment of subsistence allowance, placing reliance on Section 47(6) of the Act, does not arise. Learned counsel would contend that, even if the petitioner is held entitled to claim payment of subsistence allowance under the bye-laws of the Co-operative Society, as these bye-laws do not constitute "law", they cannot be enforced in proceedings under Article 226 of the Constitution of India. Learned counsel would emphasize that, since grave and serious charges of corruption are leveled against the

petitioner and he has been charged of having indulged in misappropriation of several lakhs of rupees, a direction to the respondents to pay him subsistence allowance would amount to putting a premium on his misconduct and, in such matters, this Court would not, ordinarily, exercise its discretion in favour of such an employee and interfere in the matter.

Under Section 47(6) of the Act, where an employee is placed under suspension pending enquiry, the employer shall pay a subsistence allowance equivalent to fifty per cent of the last drawn wage for the first six months and at seventy five per cent of the last drawn wage beyond six months during the period of suspension and if the total period of suspension exceeds one year, the employee shall be entitled to full wages during the suspension period and the period of suspension shall be treated as on duty. As such, an employee covered by the provisions of the A.P. Shops and Establishments Act would be entitled to fifty per cent of the last draw wage for the first six months of his suspension, seventy five per cent for the next six months and, on completion of one year of suspension, to full wages and allowances. An “employee” has been defined, under Section 2(8), to mean a person wholly or principally employed in and in connection with any establishment. Section 73 of the Act is the exemption provision and under sub-section (1) (a) thereof, nothing in the Shops and Establishments Act shall apply to employees in any establishment

in a position of management and having control over the affairs of the establishment, whose average monthly wages exceed sixteen hundred rupees. The fact that the wages of the petitioner exceeds Rs. 1600/- P.M. is not in dispute. What is in dispute is whether the petitioner is in a position of management and has control over the affairs of the establishment.

While Sri P.Raghavender Reddy, learned counsel for the petitioner, would contend that the petitioner does not exercise any such power, Sri O. Manohar Reddy, learned counsel for the respondents, would emphasize that the petitioner as a Secretary of the society exercised such a power and since, under Sec. 73(1) (a) of the Act, the provisions of the A.P. Shops and Establishments Act shall not apply to such a person, the petitioner cannot claim subsistence allowance on the basis of Section 47(6) of the A.P. Shops & Establishments Act.

While it is true that this Court is not precluded from examining disputed questions of fact in proceedings under Article 226 of the Constitution of India, ordinarily when an adjudicatory mechanism is provided for resolution of such disputed questions of fact, this Court would, normally, exercise restraint and not take upon itself the task of adjudicating such disputed questions of fact. In the present case, the dispute revolves around the question as to whether the petitioner can

be said to be an employee in a position of management and having control over the affairs of the establishment and since such questions can be adjudicated, on a claim being made under Section 51 of the Act, by the authority notified under Section 50 of the Act, I see no reason to adjudicate these disputed questions of fact in proceedings under Article 226 of the Constitution of India. While admission of writ petition, and its pendency for a long period on the file of this Court, would be a relevant factor to be taken into consideration while deciding whether the petitioner should be relegated to the alternative remedy available to him under the A.P. Shops and Establishments Act, it cannot be lost sight of that the present writ petition was filed just a year ago in February, 2006 and cannot be said to be pending on the file of this Court for an inordinate length of time.

The question which, however, remains to be considered is whether this Court should entertain a writ petition for payment of subsistence allowance in accordance with the byelaws of a Co-operative Society. It is well settled, as held by two Full Bench judgments of this Court, in **SRI KONASEEMA CO-OPERATIVE CENTRAL BANK LTD. AMALAPURAM AND ANOTHER V. N. SEETHARAMA RAJU**[2], and, in W.P. No. 3371 of 1998 dated 22-07-2005 and the Division Bench in **CH. ANKAMMA V. REGISTRAR OF CO-OPERATIVE SOCIETIES,**

HYDERABAD AND OTHERS[3]**,** that bye-laws, made by a Co-operative Society, do not have the force of law and that violation of such bye-laws cannot, ordinarily, be challenged in writ proceedings and it is only if a mandatory provision of a statute or a statutory rule is violated, would this Court entertain a writ petition. The claim for payment of subsistence allowance based on the provisions of the bye-laws of a Co-operative Society would not, ordinarily, be adjudicated in writ proceedings under Article 226 of the Constitution of India, since the bye-laws made by a society, registered under the A.P. Co-operative Societies, do not have the force of law.

It is true that in **ABL INTERNATIONAL LTD**[1] the Supreme Court held that, in appropriate cases, a writ petition was maintainable, as against the State or an instrumentality of the State, even in matters involving contractual obligations, that merely because some disputed questions of fact arise for consideration, the same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule. The Supreme Court further observed that, while entertaining an objection to the maintainability of a writ petition, under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution and the High Court, having regard to the facts of the case, has the discretion to entertain or not to entertain a writ petition. Unlike

in the present case, in **ABL INTERNATIONAL LTD**[1] violation of the terms of the contract/agreement was by an instrumentality of the State. In the present case, the respondent society is not an instrumentality of the State under Article 226 of the Constitution of India. As held in **ABL INTERNATIONAL LTD**[1], whether the Court should entertain and adjudicate disputed questions of fact is a matter of discretion under Article 226 of the Constitution of India and it is for this Court to decide, in the facts and circumstances of each case, whether discretion should be exercised or not. The plenary jurisdiction of the High Court under Article 226 of the Constitution of India would, ordinarily, not to be exercised to the exclusion of effective alternative remedies. That does not mean that the High Court is prohibited from doing so. The question is not of lack of jurisdiction but of exercise of discretion. While even disputed questions of fact can be adjudicated by the High Court, under Article 226 of the Constitution of India, such disputed questions of fact, more so, when they arise out of non-statutory contractual disputes, which are in the private law realm, are better suited for adjudication before a civil court of competent jurisdiction.

The Division Bench of this Court in **Sri Lalitha Devi Gas Agencies v. Hindustan Petroleum Corporation Ltd**[4] held:

> "….**Now that a specific clause has been included in the agreement that has been entered into between the parties, in our opinion, the entire matter has to be referred to the sole arbitrator of the Managing Director of the Corporation or some officer of the Corporation,**

who may be nominated by him. The petitioner is at liberty to raise all the contentions, which have already been raised in this writ petition and also in the writ appeal and file any other additional document, if the petitioner so chooses. Likewise, the respondent – Corporation is also at liberty to raise their claim if any, before the arbitrator. Now, that both the parties have agreed to refer the dispute for arbitration, we need not once again direct the petitioner to invoke clause 38 and correspond with the respondent, which in our opinion, is wholly unnecessary. The arbitrator shall immediately after entering upon the appearance, may issue notice to both parties and then proceed further to consider all the claims made by the petitioner and the respondent – Corporation. The Managing Director, who is nominated as arbitrator shall conduct and complete arbitration proceedings within two months.

The arbitration proceedings shall commence within one month from the date of the receipt of our order. Till the arbitration proceedings are completed the status quo obtaining as on today shall be maintained between the parties. There will be stay of collection of the impugned demand till the arbitrator completes the arbitration proceedings. …(emphasis supplied)

In **Sanjana M. Wig v. Hindustan Petroleum Corporation**[5], the Supreme Court observed:

"…….It may be true that in a given case when an action of the party is dehors the terms and conditions contained in an agreement as also beyond the scope and ambit of the domestic forum created therefor, the writ petition may be held to be maintainable; but indisputably therefor such a case has to be made out. It may also be true, as has been held by this Court in *Amritsar Gas Service* and *E. Venkatakrishna*1 that the arbitrator may not have the requisite jurisdiction to direct restoration of distributorship having regard to the provisions contained in Section 14 of the Specific Relief Act, 1963; but while entertaining a writ petition even in such a case, the court may not lose sight of the fact that if a serious disputed question of fact is involved arising out of a contract qua contract, ordinarily a writ

> petition would not be entertained. A writ petition, however, will be entertained when it involves a public law character or involves a question arising out of public law functions on the part of the respondent……." (emphasis supplied)

In the facts and circumstances of the present case, I see no reason to adjudicate disputed questions of facts whether the petitioner is in a position of management and having control over the affairs of the establishment and whether he is, thereby, exempted from the applicability of the provisions of the A.P. Shops and Establishments Act, for these are all matters which are better adjudicated, on the basis of evidence, by the authority designated under the A.P. Shops and Establishments Act. Leaving it open to the petitioner to avail such other remedies, as are available to him in law, the writ petition is dismissed. No costs.

C.C. No. 615 of 2006

This Contempt Case is filed for violation of the Interlocutory order of this Court dated 04-04-2006. Since an Interlocutory order does not survive dismissal of the writ petition, I see no reason to now examine whether the respondents have violated the interim orders of this Court. Since the writ petition itself has been dismissed the contempt case also stands dismissed.

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RAMESH RANGANATHAN, J

Dated: 26-04-2007

vp

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[1] (2004) 3 SCC 553

[2] AIR 1990 AP 171 F.B.

[3] 2001 (4) ALT 648 (DB)

[4] (2002) 5 ALD 389

[5] (2005)8 SCC 242